No. 74-884

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPHINE M. POWELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
JOHN C. KEENEY,
Acting Assistant Attorney General,
FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
RICHARD S. STOLKER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 501 F. 2d 1136.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1974 (Pet. App. 4a). The court of appeals permitted the government to file an untimely petition for rehearing and suggestion for rehearing *en banc,* which it denied on November 21, 1974 (Pet. App. 6a). By order of December 13, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including January 20, 1975. The petition was filed on January 17, 1975, and was

granted on March 17, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a statute prohibiting the mailing of firearms "capable of being concealed on the person" is unconstitutionally vague on its face.

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

The Fifth Amendment to the Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

18 U.S.C. 1715 provides in relevant part:

> Pistols, revolvers, and other firearms capable of being concealed on the person are nonmailable and shall not be deposited in or carried by the mails or delivered by any officer or employee of the Postal Service. Such articles may be conveyed in the mails, under such regulations as the Postal Service shall prescribe [to enumerated recipients] * * *.

39 C.F.R. 124.5 provides in relevant part:

> (a) *Nonmailable firearms.* (1) Pistols, revolvers, and other similar firearms capable of being concealed on the person, addressed to persons other than those indicated in § 124.5(b), are nonmailable.
>
> * * * * *
>
> (4) The phrase "all other firearms capable of being concealed on the person" includes, but is not limited to, short-barreled shotguns, and short-barreled rifles.

(5) The term "short-barreled shotguns" means a shotgun having one or more barrels less than 18 inches in length and any weapon made from a shotgun (whether by alteration, modification, or otherwise) if such weapon as modified has an overall length of less than 26 inches. A short-barreled shotgun of greater dimensions may also be regarded as nonmailable when they [*sic*] have characteristics allowing them to be concealed on the person.

* * * * *

STATEMENT

1. On February 28, 1973, Mrs. Theresa Bailey received in the mail an unsolicited package postmarked Spokane, Washington, and addressed to her at her residence in Tacoma, Washington (A. 9–17). This package contained two shotguns, shotgun shells, and hacksaw blades (A. 13–16, 26). Mrs. Bailey did not know who had sent the package and did not retain the outer wrapper (A. 17). She contacted her husband, an inmate in McNeil Island Federal Penitentiary, who told her he knew nothing of the package or its contents (A. 8–10, 17, 38–39).[1]

Mrs. Bailey subsequently met with agents of the Federal Bureau of Investigation and an official of the penitentiary. She turned the package and its contents over to them (A. 17–18, 51–52). The ensuing investigation established that one of the shotguns had been purchased by respondent in Spokane on February 21, 1973 (A. 87–88) and that the other had been

[1] Respondent's husband, Travis Powell, also was incarcerated at McNeil Island (A. 107, 112).

purchased on the same date by a woman of respondent's general description (A. 89–90).

On March 9, 1973, Mrs. Bailey received a telephone call from a woman who advised her that "a second package was coming, and it was a mistake" (A. 18–19). The caller, who did not identify herself, asked Mrs. Bailey to give this package to "Sally."[2] When Mrs. Bailey replied she "did not have an address or any way of giving it to Sally," the caller said she would call back (A. 19). The Federal Bureau of Investigation ascertained after investigation that the telephone call had been placed from respondent's residence inSpokane (A. 92–94; Tr. 263, 501).

Mrs. Bailey received the second package in the mail on March 13, 1973, and gave it unopened to the investigating agents (A. 19–20, 55–56). The package bore respondent's return address (A. 83).[3] This second package contained a sawed-off shotgun (with a barrel length of 10 inches and an overall length of 22⅛ inches), together with two boxes of shotgun shells (A. 56, 58–59, 96–97).

2. Respondent was indicted on a single count of mailing a firearm capable of being concealed on the person, in violation of 18 U.S.C. 1715. She moved to dismiss the indictment on the ground that the statute is unconstitutionally vague. The district court denied

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[2] Mrs. Bailey did not know who "Sally" might be, nor did she recognize the caller's voice (A. 19).

[3] A handwriting expert testified that, in his opinion, respondent had written the addresses on this package (A. 104–105).

this motion from the bench (Tr. 521–522). After a jury trial, respondent was convicted and sentenced to a term of two years' imprisonment (Pet. 4).

3. The court of appeals reversed, writing a brief opinion holding that the provision of Section 1715 forbidding the mailing of firearms "capable of being concealed on the person" is unconstitutionally vague (Pet. App. 1a–3a). The court of appeals apparently thought that this result was required not only because the statute does not identify the size, build and dress of the "person" to whom it refers, but also because a more precise statute might have been drawn using numerical definitions. The court wondered (Pet. App. 2a–3a):

> Did Congress intend that this "person" be the person mailing the firearm, the person receiving the firearm, or, perhaps, an average person, male or female, wearing whatever garb might be reasonably appropriate, wherever the place and whatever the season? We believe that this question, of itself, demonstrates the impermissible vagueness of the statute and its inadequacy to define the intended offense with sufficient specificity.

The court of appeals did not attempt to ascertain whether respondent knew or could have known that the sawed-off shotgun she mailed was "capable of being concealed on the person." Instead, the court declared that the statute is unconstitutionally vague "as it is applied to 'other firearms' " (Pet. App. 3a), thereby invalidating that portion of the statute on its face.

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ARGUMENT

AN ORDINARY CRIMINAL STATUTE SUCH AS SECTION 1715 SHOULD NOT BE INVALIDATED ON ITS FACE

A. INTRODUCTION AND SUMMARY

Two competing principles dominate the law of vagueness. On the one hand, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process" (*Connally* v. *General Construction Co.*, 269 U.S. 385, 391). But, on the other hand, it has never been doubted that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subequently estimates it, some matter of degree" (*Nash* v. *United States*, 229 U.S. 373, 377). The conflict is created by the imprecision inherent in language and by the need for legislatures to speak to situations that cannot be foreseen in full particularity. Consequently, "[w]henever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk" (*United States* v. *Wurzbach*, 280 U.S. 396, 399).

Claims that a statute is unconstitutionally vague raise difficult issues because of the undisputed validity (and great sweep) of the competing principles that govern their resolution. This case concerns the manner in which the difficult task of resolving such claims

should be carried out. It does not require the Court to answer the ultimate question whether Section 1715 did or did not give respondent adequate notice of the conduct it forbids.

In considering an assertion that an ordinary criminal statute is void for vagueness, a court first should ask: "Does the statute intelligibly prohibit anything?" If the court concludes that some body of conduct clearly is forbidden by the statute, then it cannot be void on its face. Most criminal statutes satisfy this test, because they describe a standard by which compliance can be measured. Section 1715, for example, establishes a standard that depends primarily (although not entirely) upon the size of the firearm; the smaller the weapon, the more readily it is "capable of being concealed on the person." But even when the statute's language is refractory, a court is under a duty to construe it (if possible) to establish such a standard, and thereby to create a benchmark by which those with a will to do so may conform their conduct to its commands.

If the statute, either by its words or as construed by a court, gives fair warning that at least some specifiable conduct is forbidden, then it cannot be struck down on its face. The court must instead inquire whether it gave notice as applied to the person and facts before it. The inevitable problems of uncertainty that arise near the outermost limits of the statute's reach may be dealt with by considering the well-established rules of criminal law that an individual who approaches close to the zone of prohibited conduct takes the risk that he or she will overstep the line, but

that where the zone of prohibited conduct is itself imprecise, a "rule of lenity" will contain the risk within reasonable bounds. The only exception to this approach is in the case of statutes that impinge overbroadly upon, and threaten to impair the exercise of, rights protected by the First Amendment. Since the shipment of firearms is not remotely connected to First Amendment interests, this exception is wholly inapplicable here.

The court below employed quite a different process. It inquired only whether the statute's language is imprecise, and whether more precise language could be imagined. Answering both questions affirmatively, it concluded that the phrase "capable of being concealed on the person" is impermissibly vague, and therefore invalid on its face, as applied to *all* "other firearms." The court did not determine whether the pertinent language of Section 1715 has an unambiguous core meaning, or whether it could be construed to produce one. Nor did the court inquire whether respondent knew or could have known, had she attempted to comply, that she was offending the statute's command. Because Section 1715 does have an ascertainable core meaning when applied to "other firearms," we submit that this case must be returned to the court of appeals for reconsideration in light of the correct standards.

B. A STATUTE CONTAINING AN INTELLIGIBLE STANDARD OF CONDUCT IS NOT VAGUE ON ITS FACE

One of the most firmly established rules of constitutional adjudication is that "vagueness challenges to statutes which do not involve First Amendment free-

doms must be examined in the light of the facts of the case at hand." *United States* v. *Mazurie,* No. 73–1018, decided January 21, 1975 (slip op. 6). This rule is supported by the fundamental principle that a litigant may assert only his own rights; unless a litigant is injured by the alleged flaw in a statute, he is not entitled to redress on the ground that the flaw may be deleterious to others.[4] A statute's potential for uncertain application may injure some without injuring others. The words of a statute may prohibit with reasonable certainty many varieties of conduct, while at the same time having only speculative effect on other conduct. The principle that a litigant may complain only of his own injury, when applied to claims of vagueness, means that one to whom the statute clearly applies may not complain that its application to others differently situated would be unconstitutionally uncertain.

This restriction, when combined with "[t]he strong presumptive validity that attaches to an Act of Congress[,] has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language" (*United States* v. *National Dairy Products*

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[4] See generally Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423 (1974).

This principle is supported by the rule that a court should not "anticipate a question of constitutional law in advance of the necessity of deciding it" (*Liverpool, New York and Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39) and by the Article III requirement of a "case or controversy."

Corp., 372 U.S. 29, 32). A statute may not be upset on an allegation of vagueness as long as it leaves little doubt as to its application to the particular case. *Cameron* v. *Johnson*, 390 U.S. 611, 616.

There are only two occasions on which a court may examine a statute "on its face." Neither is applicable to this case. First, a statute that affects or attempts to regulate First Amendment freedoms may, in certain instances, be dealt with on its face (*i.e.*, at the behest of a litigant challenging its application to circumstances different from those of his case) because of the special dangers vagueness poses to protected and favored activities. A vague statute carries with it the potential for overbreadth; the more nebulous the standards of the statute, the more likely some of its applications may touch upon protected speech. See, *e.g.*, *Coates* v. *City of Cincinnati*, 402 U.S. 611. Because of this possibility, vague statutes will produce a "chilling effect" as people attempt to refrain from saying or doing things that would expose them to the danger of prosecution, even for protected speech. See, *e.g.*, *Gooding* v. *Wilson*, 405 U.S. 518, 521; *Thornhill* v. *Alabama*, 310 U.S. 88, 97–98. Moreover, even when protected speech is not "chilled," a vague statute offers opportunities for discriminatory enforcement that might harass those who have done no more than disagree with the views of the local authorities. See, *e.g.*, *Smith* v. *Goguen*, 415 U.S. 566, 573–578; *Grayned* v. *City of Rockford*, 408 U.S. 104, 109. But these dangers do not extend beyond the realm of First Amendment freedoms. It would be permissible, for example, for Congress to enact a statute

having a "chilling effect" on an individual who desired to mail a shotgun with an overall length of 30 inches, since no special constitutional protection shelters the mailing of shotguns. Because Section 1715 does not touch upon First Amendment interests, these cases do not support a facial attack.[5]

The second exception covers statutes so vague that "no standard of conduct is specified at all." *Coates, supra,* 402 U.S. at 614. The statute can be assessed on its face if it fails to create "an ascertainable standard of guilt, * * * [and] leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee * * *" (*United States* v. *Cohen Grocery Co.,* 255 U.S. 81, 89). *Lanzetta* v. *New Jersey,* 306 U.S. 451, the only case relied upon by the court of appeals, involved such a statute.[6] When a statute is so ambulatory that it has no core of intelligible prohibition, it would be vain to attempt to consider it only "as applied," for it would be vague as applied to any conceivable acts, unless a court abjured the judicial role and rewrote the legislation entirely.

Few statutes are this vague. Most contain within them some standard devised by the legislature, reasonably referring to the common law or common understanding, that enables those who sincerely desire to do so to comply with their requirements. For

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[5] Even in First Amendment cases, those whose acts are within the absolute core of the statute's prohibition cannot mount a facial challenge. *Smith, supra,* 415 U.S. at 577–578; *Broadrick* v. *Oklahoma,* 413 U.S. 601, 608.

[6] See also *United States* v. *Cohen Grocery Co., supra; Connally, supra; Papachristou* v. *City of Jacksonville,* 405 U.S. 156.

example, *Nash* v. *United States, supra,* dealt with the Sherman Antitrust Act and with the "rule of reason" developed under it. The Court held that trade usage and developing case law created a standard of unreasonable combinations in restraint of trade sufficient to support criminal penalties.

When the unaided words of a statute appear to leave open to doubt its application to a great many situations, it nevertheless is sufficiently specific as long as it contains "a standard of some sort" (*Connally, supra,* 269 U.S. at 392).[7] Once the statute or its legislative history establishes an objective standard, the Court then can use the ordinary principles of statutory construction to provide the required precision in application.[8] When a statute is challenged for vagueness, "we have consistently sought an interpretation which supports the constitutionality of legislation" (*National Dairy, supra,* 372 U.S. at 32).[9] If a

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[7] The "standard" ordinarily must be one capable of determination by reference to objective criteria. The vagueness problem is more difficult when the statute refers to the subjective reactions of unknown (and perhaps unknowable) people. See, *e.g.*, *Coates*, *supra* (statute making it illegal for three or more persons to "conduct themselves in a manner annoying to persons passing by" is unconstitutionally vague). But see *Grayned*, *supra* (statute penalizing those "willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of [a] school session" is not vague).

[8] See Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U.Pa. L. Rev. 67, 82–85 (1960), which suggests that this Court's inability to give a narrowing construction to state statutes accounts for the fact that almost all statutes held unconstitutional for vagueness have been state statutes.

[9] See also *United States* v. *Vuitch*, 402 U.S. 62, 72; *Screws* v. *United States*, 325 U.S. 91, 98–100. Cf. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348.

"general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction" (*United States* v. *Harriss,* 347 U.S. 612, 618). The construction may take into account the legislative intent as revealed in the legislative history. But it may as properly utilize ordinary human understandings. "The use of common experience as a glossary is necessary to meet the practical demands of legislation" (*Sproles* v. *Binford,* 286 U.S. 374, 393).[10]

Because Section 1715 does not impinge upon protected speech, and because it is not so irremediably vague that it conveys no ascertainable prohibition at all, it must be assessed as it applies to particular cases, on their particular facts. "[I]f the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise" (*Harriss, supra,* 347 U.S. at 618). Or, to put the proposition in a slightly different way, "if there is any difficulty * * * it will be time enough to consider it when raised by someone whom it concerns" (*Wurzbach, supra,* 280 U.S. at 399).

C. PROBLEMS ARISING AT THE OUTER REACHES OF A STATUTE'S SCOPE MUST BE ASSESSED "AS APPLIED"

If the statute, either by its words or in light of common experience and judicial construction, estab-

[10] See also, *e.g.*, *McGowan* v. *Maryland*, 366 U.S. 420, 428–429 (the words of a statute may be augmented by "ordinary commercial knowledge" and "reasonable investigation").

lishes some ascertainable standard by which those who seek to do so may conform their conduct to its command, then problems of vagueness must be assessed as the statute is applied to particular facts. *National Dairy, supra,* 372 U.S. at 33. It is not relevant to this assessment that some varieties of conduct may be neither clearly forbidden nor clearly permitted. The court of appeals apparently believed that, if difficult cases could be put (for example, a small person on a beach in southern California might not wear sufficient clothing to conceal a sawed-off shotgun), the statute must fall. But "[i]n most English words and phrases there lurk uncertainties" (*Robinson* v. *United States,* 324 U.S. 282, 286), and "lack of precision is not itself offensive to the requirements of due process" (*Roth* v. *United States,* 354 U.S. 476, 491). In the case of most statutes, "generality * * * does not obscure its meaning or impair its force within the scope of its application * * *" (*United States* v. *Classic,* 313 U.S. 299, 328–329). "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous * * *" (*United States* v. *Petrillo,* 332 U.S. 1, 7).

This Court succinctly summarized all of these principles only last term. It wrote: "None of [the standards by which vagueness is evaluated] suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and

literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy,* 417 U.S. 733, 756.

This does not mean, of course, that those whose conduct may be within the zone of uncertainty are without recourse. If the statute does not give them fair warning, it may be vague as applied to them. Moreover, true ambiguity in the ambit of a criminal statute often is resolved by judicial construction in favor of lenity.[11] This rule, "founded on the tenderness of the law for the rights of individuals" (*United States* v. *Wiltberger,* 5 Wheat. 76, 95), ameliorates any unnecessary harshness and avoids the imposition of punishment because of truly unexpected applications of a statute.

Particularly in light of these saving doctrines, however, an individual cannot claim that the marginal uncertainties inevitably surrounding criminal statutes render them unconstitutional. Almost all statutes, read in light of their legislative history and judicial construction, and "[t]aken in connection with the danger to be prevented * * * lay[] down a plain enough rule of conduct for anyone who seeks to obey the law" (*United States* v. *Alford,* 274 U.S. 264, 267). "[F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government

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[11] See, *e.g.*, *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222; *Bell* v. *United States*, 349 U.S. 81, 83; *Rewis* v. *United States*, 401 U.S. 808; *United States* v. *Enmons*, 410 U.S. 396, 411.

inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines* v. *United States,* 342 U.S. 337, 340.

D. SECTION 1715 CONTAINS AN INTELLIGIBLE STANDARD OF CONDUCT

We submit that Section 1715 contains a clear standard of conduct. The statute states that all firearms [12]

[12] Respondent apparently contends (Br. in Opp. 4–6) that sawed-off shotguns are not "firearms" within Section 1715. This argument, which was not considered by the court of appeals, is without support. Section 1715 was based upon the Act of February 8, 1927, 44 Stat. 1059. The legislative history of that Act (see H.R. Rep. No. 610, 69th Cong., 1st Sess. (1926)) indicates that a major purpose of the bill was to prevent the use of the mails to transport firearms that were often illegal under state law. Sawed-off shotguns fit that description. Postmaster General New, commenting on the proposed legislation, remarked that the bill should exempt only firearms "incapable" of being concealed, "such as firearms used in field sports, hunting, etc." H.R. Rep. No. 610, *supra*, at p. 2. Representatives on the floor of the House expressed a desire to limit access to all sorts of concealable firearms that might be used to perpetrate crimes. See 66 Cong. Rec. 725–735 (1924). Similarly, when Congress for purposes of other legislation has defined "firearm" more specifically, it has included short-barreled shotguns within that term. See 26 U.S.C. 5845(a); 18 U.S.C. 921(a)(3)(A). We submit that there is ample support for the conclusion that "other firearms" includes sawed-off shotguns.

Respondent relies upon the "*ejusdem generis*" principle. But this principle is a tool of statutory construction, not a method of defeating a statute's purpose. *Gooch* v. *United States*, 297 U.S. 124, 128. Sawed-off shotguns are as concealable as many long-barreled pistols and revolvers. They

"capable of being concealed on the person" are nonmailable. This establishes a standard referring primarily to the size of the firearm; the smaller the firearm, the more readily it is "capable of being concealed on the person." [13] Some long-barreled weapons are so large that they would not be capable of such concealment. But others are sufficiently short that they are "capable" of being concealed—by people determined to conceal them—under a jacket or coat, inside a pants leg, or even in a hand bag. A sawed-off shotgun with a 10 inch barrel and an overall length of approximately 22 inches is "capable" of being concealed in hand bags of even moderate size, and would fit under the jacket of most men's suits. Indeed, common experience suggests that the usual, and perhaps the sole, reason for sawing off the barrel of a shotgun is to permit its concealment.[14]

Even if some uncertainty remains in light of this common experience, this Court should construe Section 1715 in a way that produces an unambiguous core of actions clearly prohibited by the statute. In so do-

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therefore share with those firearms the characteristic Congress believed warranted exclusion from the mails. See also 29 C.F.R. 124.5(a)(4), discussed *infra*, p. 18.

[13] "Size" includes not only barrel length, but also weight and bulkiness. Other relevant factors include shape and the ease with which a weapon can be broken down and reassembled.

[14] For a sampling of recent cases in which like weapons concealed on the person have been used in criminal activity, see *e.g.*, *United States* v. *Ackerson*, 502 F. 2d 300 (C.A. 8); *United States* v. *Mayo*, 498 F. 2d 713 (C.A.D.C.); *United States* v. *Story*, 463 F. 2d 326 (C.A. 8), certiorari denied, 409 U.S. 988; *Harrison* v. *United States*, 359 F. 2d 214 (C.A.D.C.); *People* v. *Owens*, 18 N.Y. 2d 972, 224 N.E. 2d 718. Cf. *State* v. *Mayfield*, 506 S.W. 2d 363 (Mo. Sup. Ct.).

ing the Court might draw upon 39 C.F.R. 124.5, an interpretive regulation promulgated by the Postal Service. Under that regulation, short-barreled shotguns are "firearms" (39 C.F.R. 124.5(a)(4)), and they are regarded by the Postal Service as "capable of being concealed on the person" if they have a barrel length of less than 18 inches and an overall length of less than 26 inches (39 C.F.R. 124.5(a)(5)). Although these regulations are not conclusive of the meaning of Section 1715, they would, if used as the basis for judicial construction, substantially clarify its meaning. Moreover, as the interpretation of Section 1715 by responsible administrative officials, they are entitled to some deference,[15] and even without judicial construction they provided guidance on the statute's meaning to all those who sought to comply. Cf. *Colten* v. *Kentucky*, 407 U.S. 104, 110. In sum, Section 1715, with or without judicial construction, provides enough guidance that it cannot be unconstitutionally vague on its face.[16]

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[15] See *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 110. Cf. *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210; *Udall* v. *Tallman*, 380 U.S. 1, 16.

[16] Many criminal statutes less precise than Section 1715 have been sustained. See, *e.g.*, *Mazurie*, *supra* ("non-Indian community"); *National Dairy*, *supra* ("unreasonably low prices"); *United States* v. *Korpan*, 354 U.S. 271, 272, 273, n. 2 ("coin operated amusement or gaming device"); *Boyce Motor Lines*, *supra* ("so far as practicable, * * * driving into or through congested thoroughfares"); *Robinson*, *supra* ("liberated unharmed" in kidnapping statute); *United States* v. *Gaskin*, 320 U.S. 527 ("condition of peonage"); *United States* v. *Ragen*, 314 U.S. 513, 517 ("reasonable allowance for salaries"); *Sproles*, *supra* ("shortest practicable route"); *United States* v. *Alford*, 274 U.S. 264 ("in or near any forest, timber, or other inflam-

The only remaining argument is the court of appeals' apparent belief that Section 1715 is defective because it could have been drafted with greater precision. This complaint is equally true, however, of every criminal statute. The Court in *Petrillo, supra,* 332 U.S. at 7, agreed that "[c]learer and more precise language might have been framed by Congress * * *," but it held that the statute nevertheless gave adequate notice of the conduct forbidden. The availability of alternative language neither adds to nor subtracts from the amount of notice the statute provides. And if, as written, it provides constitutionally adequate notice, it must be sustained for that reason. *Roth* v. *United States, supra,* 354 U.S. at 491.

Additional specificity in criminal statutes is not necessarily beneficial.[17] Although an increase in specificity (here, the adoption of numerical definitions) would enable those who wish to mail firearms to assess with greater accuracy the probability that their acts would violate the statute, it also would risk placing outside the scope of the statute some conduct that Congress desired to prohibit. Every increase in specificity would carry with it an opportunity, for those who desire to bring about the result the statute is intended to prevent, to alter their behavior to circum-

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mable material"); *Miller* v. *Oregon*, 273 U.S. 657 (explained at 274 U.S. 464–465) (drive a vehicle in "a careful and prudent manner"); *Omaechevarria* v. *Idaho*, 246 U.S. 343, 345 n. 3 (any range "usually occupied by any cattle grower").

[17] For a comprehensive discussion of the costs and benefits of both generality and specificity, see Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Legal Studies 257 (1974).

vent the statutory purpose. In other words, greater specificity frequently generates "loopholes." For example, if Section 1715 were amended to express its prohibition in terms of the length of the firearm, industrious malefactors would be able to create firearms of the minimum length that also possessed other characteristics (such as slimness, or ability to be broken down and reassembled rapidly) making them as readily concealable as shorter weapons, the mailing of which is forbidden.[18] This would be contrary to the intention of Congress, for it would produce the result (the mailing of firearms capable of being concealed on the person) that the statute was intended to prohibit. By framing its statutes in terms of the result to be achieved Congress is able, at minimal cost in uncertainty, to prohibit more effectively the evil that prompted the statute's enactment.

In some statutes Congress has been more precise.[19] That is its prerogative. But unless the language it chose in Section 1715 is itself too indefinite to provide an ascertainable standard of conduct, it is not consti-

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[18] The Postal Service regulations, which establish numerical guidelines dependent on the length of the firearm, also provide that shotguns of greater dimensions are nonmailable if they have "characteristics allowing them to be concealed on the person." 39 C.F.R. 124.5(a)(5).

[19] 18 U.S.C. 921(a)(6) defines "short-barreled shotgun" as a shotgun with barrels less than 18 inches long and an overall length of less than 26 inches. The firearm mailed by respondent is a "short-barreled shotgun" under that standard. Some States (see, *e.g.*, Revised Code of Washington Annotated § 9.41.010 (1961)) also use numerical definitions. Under the Washington code, a "short firearm" includes any shotgun with a barrel length of less than 12 inches. The firearm mailed by respondent is a "short firearm" within even that restrictive standard.

tutionally relevant that it could have followed the course of more particularized definition.

For the reasons we have advanced above, we submit that Section 1715 establishes a standard sufficiently clear that at least some types of conduct are indisputably within the scope of its prohibition. Accordingly, the court of appeals was not at liberty to invalidate it on its face.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to consider whether Section 1715 gave respondent adequate notice that her conduct was prohibited.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
JOHN C. KEENEY,
Acting Assistant Attorney General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.
RICHARD S. STOLKER,
Attorneys.

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